No. 39700-5-II

84475-5

IN THE COURT OF APPPEALS FOR THE STATE OF WASHINGTON
DIVISION II

IN RE THE PERSONAL RESTRAINT PETITION OF:

EDWARD M. GLASMANN,

PETITIONER.

REPLY IN SUPPORT OF PERSONAL RESTRAINT PETITION

Reply to Response

Jeffrey E. Ellis #17139
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A. INTRODUCTION

Because material facts are disputed in this case, this Court should either remand this PRP for an evidentiary hearing or for a decision on the merits. RAP 16.11 (b) ("If the petition cannot be determined solely on the record, the Chief Judge will transfer the petition to a superior court for a determination on the merits or for a reference hearing.").

As a result, the State's argument to this Court in its *Response* that its facts are more persuasive than Glasmann's facts is premature. Instead, these arguments are best made after a trial court has heard the evidence and found facts. For that reason, Glasmann's reply is limited to demonstrating the need for a hearing prior to any decision on the merits.

B. ARGUMENT

1. MR. GLASMANN'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM INVOLVES DISPUTED FACTS. THE "RELITIGATION BAR" DOES NOT APPLY. THIS CLAIM SHOULD BE REMANDED FOR AN EVIDENTIARY HEARING.

On direct appeal, this Court rejected Glasmann's *pro se* argument that counsel was ineffective for failing to request an intoxication instruction, reasoning:

> ....*the record* does not contain ample evidence that his level of intoxication affected his ability or lack thereof to form the mental state required to establish the crimes charged. At best, the evidence merely showed that Glasmann had ingested unspecified amounts of methamphetamine, ecstasy, and alcohol the night of the incident. As such, Glasmann was not entitled to an involuntary intoxication instruction.

(internal citation removed, emphasis supplied).

In his PRP and for the first time, Glasmann supplied competent, admissible, and sufficient evidence that his level of intoxication affected his ability or lack thereof to form the mental state required to establish the crimes charged.

In response, the State argues that this Court is precluded from considering this claim—no matter what new evidence Glasmann has now presented. The State specifically argues that, because the facts of Glasmann's intoxication were known (at least to Glasmann) the issue could have been raised on direct appeal and therefore cannot be raised in this petition. The State misconstrues the applicable legal standard.

Under Washington law, a personal restraint petitioner may raise an issue decided on direct appeal if the "interests of justice require relitigation." *Personal Restraint of Taylor*, 105 Wn.2d 683, 688, 717 P.2d 755 (1986). Washington courts have never precisely defined the "interests of justice" standard. Rather, they have adopted the intentionally loose test originally set out by the U.S. Supreme Court in *Sanders v. United States*, 373 U.S. 1 (1963). *See Taylor*, 105 Wn.2d at 688-89, *quoting Sanders*, 373 U.S. at 17 ("ends of justice" standard "cannot be too finely particularized"). The "ends of justice" standard "is clearly not a 'good cause' standard." *Personal Restraint of Holmes*, 121 Wn.2d 327, 330, 849 P.2d 1221 (1993).

Consequently, Washington courts have re-examined claims whenever a petitioner raises "new points of fact and law that *were not* or could not have been raised in the principal action, to the prejudice of the defendant." *Personal Restraint of Gentry*, 137 Wn.2d 378, 388, 972 P.2d 1250 (1999) (emphasis added). There does not appear to be any Washington case in which an appellate court found that the petitioner had established that he was otherwise entitled to relief, yet refused to entertain the claim because the ends of justice did not favor relitigation. In fact, Taylor explains that the ends of justice will always be satisfied whenever a petitioner "is actually prejudiced by the error." *Taylor*, 105 Wn.2d at 688.

In addition, state court have found the "ends of justice" to be satisfied when a petitioner presents additional allegations in support of the same legal claim made on direct appeal, when he presents the same allegations but improves his constitutional analysis, and when the court was simply wrong the first time around. For example, in *Personal Restraint of Brett*, 142 Wn.2d 868, 16 P.3d 601 (2001), the state court found trial counsel ineffective in failing to present expert testimony concerning the defendant's medical and mental conditions. Brett had previously argued on direct appeal that trial counsel were ineffective, and had specifically relied on counsel's failure to explore Brett's fetal alcohol syndrome. *Id.* at 883 (conc. op. of Talmadge, J.) *citing State v. Brett*, 126 Wn.2d 136, 202-04, 892 P.2d 29 (1995). *See also, State v. Brett,* 126 Wn.2d at 198-200.

Nevertheless, the stronger evidence of ineffectiveness presented in the PRP justified revisiting the issue and granting relief.

In *Personal Restraint of Percer*, 111 Wn. App. 843, 47 P.3d 576 (2002), the Washington Court of Appeals permitted the petitioner to relitigate an issue simply because the Court was convinced it had made a mistake in the direct appeal. The Washington Supreme Court reversed on the merits, but confirmed that the Court of Appeals properly reviewed the claim. *Percer*, 150 Wn.2d at 54.

Because Glasmann's claim depends on facts outside the record, this PRP is the appropriate vehicle in order to bring the claim. *State v. McFarland,* 127 Wn.2d 322, 338, 899 P.2d 1251 (1995). Indeed, this Court held on direct appeal that a claim of ineffectiveness could only succeed if extra-record facts were developed. This is precisely what Glasmann did in this petition—provide this Court with facts that are not in the trial record.

Glasmann should not be turned out of court for doing what this Court suggested was both appropriate and necessary. Instead, this Court should remand for an evidentiary hearing or for a determination on the merits.

After a PRP is filed and briefed, the "Chief Judge determines at the initial consideration of the petition the steps necessary to properly decide on the merits the issues raised by the petition. If the issues presented are frivolous, the Chief Judge will dismiss the petition. If the petition is not

frivolous and can be determined solely on the record, the Chief Judge will refer the petition to a panel of judges for determination on the merits." RAP 16.11.[1] The rule further provides:

> If the petition cannot be determined solely on the record, the Chief Judge will transfer the petition to a superior court for a determination on the merits or for a reference hearing.

Id. Thus, the Chief Judge has the option of sending the entire PRP to the trial court for both an evidentiary hearing or referring those issues based on contested extra-record facts to the trial court for the conduct of an evidentiary hearing and entry of factual findings. In the latter case, this Court then applies those factual findings to the applicable law.

As a threshold matter, the petitioner must state the facts underlying the claim of unlawful restraint and the evidence available to support the factual allegations. RAP 16.7(a)(2)(i). Bald assertions and conclusory allegations will not support the holding of a hearing. *See In re Williams,* 111 Wn.2d 353, 364-65, 759 P.2d 436 (1988). Thus, a mere statement of evidence that the petitioner *believes* will prove his factual allegations is not sufficient.

Rather, with regard to the required factual statement, the petitioner must state *with particularity* facts which, if proven, would entitle him to relief. Where Petitioner's allegations are based on matters outside the existing record, the petitioner must demonstrate that he has competent,

[1] Although not defined in the rule, frivolousness is generally defined as "wholly without merit."

admissible evidence to establish the facts that entitle him to relief. Where facts are outside of the trial record and especially where the facts are disputed and/or involve credibility determinations, the need for an evidentiary hearing is at its zenith. *See Frazer v. United States,* 18 F.3d 778, 784 (9th Cir.1994) ("Because all of these factual allegations were outside the record, this claim on its face should have signaled the need for an evidentiary hearing."). Borrowing from the analogous habeas standard (a comparatively higher standard), in showing a colorable claim, a petitioner is "required to allege specific facts which, if true, would entitle him to relief." *Ortiz v. Stewart,* 149 F.3d 923, 934 (9th Cir.1998) (internal quotation marks and citation omitted).

Once the petitioner makes this threshold showing, the court will then examine the State's response to the petition. The State's response must answer the allegations of the petition and identify all material disputed questions of fact. RAP 16.9. In order to define disputed questions of fact, the State must meet the petitioner's evidence with its own competent evidence. If the parties' materials establish the existence of material disputed issues of fact, then the superior court will be directed to hold a reference hearing in order to resolve the factual questions.

In short, the purpose of a reference hearing is to resolve genuine factual disputes, not to determine whether the petitioner actually has evidence to support his allegations. An evidentiary hearing plays a central

role in sorting through and ensuring the reliability of the facts upon which legal judgments are made. *See Siripongs v. Calderon,* 35 F.3d 1308, 1310 (9th Cir. 1994) (A habeas petitioner who asserts a colorable claim who has never been given an opportunity to develop a factual record on that claim, is entitled to an evidentiary hearing in federal court).

Material disputed facts exist in this case. Glasmann presented facts (through the declarations of witnesses) in his petition, which the State has disputed (also through declarations) in its answer. Only a trial court can resolve those disputed facts.

For that reason, Glasmann makes only a brief argument regarding the significance of trial counsel's declaration.

In this case, defense counsel was aware of Glasmann's intoxication prior to trial. In fact, Glasmann states that he understood intoxication would be the focus of the defense. As expected, Glasmann's jury heard evidence, solicited by defense counsel, of Glasmann's illegal drug use. Thus, whatever counsel may say today about his trial strategy, it was not a strategy that sought to exclude evidence of Glasmann's voluntary use of drugs. Instead, defense counsel obviously sought to have the jury learn about Glasmann's use of drugs. However, trial counsel stopped there—at a point where the jury heard about Glasmann's use of illegal drugs, but also without sufficient evidence *or* an instruction that would have permitted jurors to give that evidence any positive (to Glasmann) effect.

Trial counsel's declaration makes no mention that he conducted any investigation into the degree of impairment Glasmann's drug use caused him. Instead, counsel's declaration makes the contradictory statements that (1) Glasmann's behavior was, in counsel's opinion, "goal-oriented and intentional," causing him to conclude that any investigation into an intoxication defense would prove fruitless; and (2) as a result, trial counsel decided to attack the State's ability to prove the degree of the crimes charged—in other words to attack the State's proof of *mens rea.* With all due respect and deference to trial counsel, he can't have it both ways. If trial counsel's strategy was to attack the *mens rea* for the kidnapping charge, evidence of Glasmann's drug intoxication would have *enhanced* that defense. If, on the other hand, trial counsel's strategy was to stay away from Glasmann's state-of-mind at the time of the crime, then there was absolutely no reason to introduce Glasmann's use of drugs.

Just as importantly, counsel unequivocally knew prior to trial that Glasmann had ingested mind-altering substances. The fact that Glasmann had a somewhat intact memory of events only shows that Glasmann did not "black out." It has little to do with the issue of whether Glasmann was able to form the requisite intent at the time of the crime. Unfortunately, it appears that trial counsel conflated memory of an event after the event with diminished capacity to form the intent at the time of the event.

Further, trial counsel's claim that Glasmann had a good memory of

events is belied by Glasmann's own testimony—where he repeatedly explains that he did not know or did not remember. *See e.g.,* 6 VRP 369, 372, 376, 378, 379, 380, 381, 382, 399, 400, 401, 402, 405.

Counsel could not make reasonable, tactical decisions without first conducting an investigation. Counsel must, at a minimum, conduct a reasonable investigation enabling him to make an informed decision about how best to represent his client. *In re Pers. Restraint of Brett,* 142 Wn.2d 868, 873, 16 P.3d 601 (2001); *Seidel v. Merkel,* 146 F.3d 750, 755 (9th Cir. 1998). *No* investigation is *not* a reasonable investigation.

However, Glasmann ultimately recognizes that these arguments can only be resolved after the facts are found. As a result, he repeats his request for an evidentiary hearing. In addition, although this matter must be resoled by the trial court, Glasmann also seeks expert assistance at that hearing pursuant to RAP 16.12; CrR 3.1.

2. MR. GLASMANN WAS DENIED HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL INEXPLICABLY OPENED THE DOOR TO THE ENTIRETY OF GLASMANN'S CRIMINAL HISTORY.

Trial counsel admittedly and understandably sought to exclude Glasmann's prior criminal history, which is why he filed a motion *in limine* on the matter. However, he also unmistakably opened the door to that criminal history, an error which he does not attempt to defend in his declaration as the result of any strategic decision.

This Court should remand this claim for an evidentiary hearing so that it can be explored along with the previous claim. In addition, because this Court must cumulatively measure the prejudice that resulted from trial counsel's deficient performance, if any is found, that can only be done by remanding all colorable claims of ineffectiveness.

3. MR. GLASMANN WAS DEPRIVED OF DUE PROCESS AND THE RIGHT TO A FAIR TRIAL WHEN THE PROSECUTOR USE HIGHLY INFLAMMATORY ILLUSTRATIONS AND INJECTED PERSONAL OPINIONS DURING CLOSING ARGUMENT.

The facts underlying this claim—whether the prosecutor showed jurors "Power Point" slides, including a slide that had the word "GUILTY" superimposed over a booking photo of Mr. Glasmann—are also disputed and should be resolved at a hearing.

Further, while the prosecutor is not sure whether he showed the slide, how else would Glasmann had known the slide had been created if it had not been shown to his jury? Indeed, Glasmann's public disclosure request for the slides notes the use of the word "GUILTY" transposed on a photo.

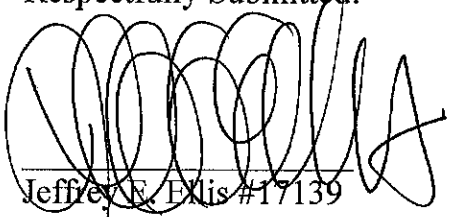
Once again, it is important to keep in mind Glasmann's cumulative error claim. Thus, even assuming that the prejudice from this claim is insufficient standing alone to justify a new trial, the only way that the cumulative prejudice can be assessed is after a hearing where the facts are first found.

C. CONCLUSION

Based on the above, this Court should either remand this case to Pierce County Superior Court for an evidentiary hearing or for a decision of this petition on the merits.

DATED this 3rd day of March, 2010.

Respectfully Submitted:



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APPENDIX A ~
GLASMANN'S PUBLIC DISCLOSURE REQUEST

E. Michael Glasmann #905293
WSRU-MCC-D-1-15
16700 177th Avenue S.E.
Post Office Box 777
Monroe Wa, 98272-9141

COPY

June 15th, 2009

Attn: Gerald T. Costello
Prosecuting Attorney's office
County City Building
955 Tacoma Avenue South, Suite 301
Tacoma, WA 98402-2100

RE: PUBLIC RECORDS REQUEST

Dear Records Officer/Prosecuting Attorney

This is a request for public records; please respond in accordance with the Washington State Public Records Act. (pursuant to RCW 42.56 et seq.) I hereby ask for the below-listed records:

1. **The power point illustration used during the closing argument in the trial of Edward M. Glasmann, cause #04-1-04983-2. Prosecutor: John C. Hillman. Trial court Judge: Beverly Grant. This illustration included the booking photo and GUILTY-GUILTY-GUILTY, transposed across said photo and was used in the projector to project said illustration on wall screen.**

2. **I wish this to be sent to me on C/D format. Please let me know the cost to copy and to mail, and I will send you sufficient funds to do so.**

I was told to request this from this office by the Pierce County Deputy Prosecuting Attorney/Legal Advisor: Craig Adams, in a letter dated June 5th 2009. Please see enclosed letter.

I sincerely thank you in advance for your time and efforts in these matters and I will look forward to hearing from you.

Respectfully submitted,

E. Michael Glasmann

PER: PUBLIC DISCLOSURE ACT RCW 42.56

RCW 42.56.520 Provides that a request be forthcoming within 5 business days following receipt of a Public Disclosure request.

RCW 42.56.080, provides,"Public records shall be available for inspection and copying, and agencies SHALL upon request for identifiable records, make them promptly available to ANY PERSON. Agencies shall not distinguish among persons requesting records, and such persons SHALL NOT BE REQUIRED TO PROVIDE INFORMATION TO THE PURPOSE OF THE REQUEST."

Under the Public Disclosure Act, "The public certainly has a right to know whether such investigations are competent, fair and expeditious, so that the public may hold accountable those elected officials responsible for law enforcement." *Cowles Public Publishing Co., v. Spokane Police, 139 Wn.2d 472, 485 (1994); See also, RCW 42.56.030 Newman v. King Co., 133 Wn.2d 565, 570 (1997)*

The Supreme Court has held that "A citizen has the right to inspect documents or portions of documents in a public attorney's litigation file, unless the document requested would not be available to a party under the discovery rules." *Limstrom v. Landenburg, 136 Wn.2d 595, 600-601 (1998). (See also Limstrom v. Landenburg, 85 Wn App. 524, 532, 933 P.2d 1055 (1997).*

Pierce County

Office of Prosecuting Attorney

REPLY TO:
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GERALD A. HORNE
Prosecuting Attorney

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COPY

July 8, 2009

E. Michael Glasmann #905293
WSRU-MCC-D-1-15
16700 177th Ave SE
P.O. Box 777
Monroe, WA 98272-9141

RE: Public Records Request Dated June 15, 2009 concerning PowerPoint Presentation, PA Reference No. 69-09/0974

Dear Mr. Glasmann:

Thank you for your check in the amount of $2.19. Enclosed please find a CD with the seven (7) pages of the PowerPoint presentation responsive to your request as indicated in our letter to you dated June 23, 2009. At this time, we are considering this request closed.

Very truly yours,

J. Glass by DG

J. Glass, Legal Assistant to
GERALD T. COSTELLO,
Deputy Prosecuting Attorney
(253) 798-6385

GTC:jlg

Enclosures (1 CD)

DECLARATION OF MAILING
I declare under penalty of perjury that on this date I deposited a properly addressed envelope/document directed to the individual and address referenced above, into the
_✓_ inter-departmental courier routing bin with instructions attached to affix prepaid postage and obtain postmark on this date.
_____ mails of the USA with appropriate pre-paid postage.
At time of deposit, said envelope contained the document to which this declaration is affixed and if any noted, the documents indicated.
Dated: 7-8-2009 at Tacoma Washington.

LTR ENCLOSURE.doc

CERTIFICATE OF SERVICE

I, Vance G. Bartley, Paralegal for the Law Offices of Ellis, Holmes & Witchley, PLLC, certify that on March 3, 2010 I served the parties listed below with a copy of *Petitioner's Reply in Support of Personal Restraint Petition* as follows:

Thomas C. Roberts
Deputy Prosecuting Attorney
930 Tacoma Ave. S Rm. 946
Tacoma, WA 98402-2171

Edward Glassman
DOC NO. 905293
WSRU/MCC
PO BOX 777
Monroe, WA 98272

3-3-10 Sea. WA
Date and Place

Vance G. Bartley